IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

Petitioner,

—v.—

ALBERTO-CULVER COMPANY,

Respondent.

MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the American Arbitration Association (hereinafter AAA or Association) hereby respectfully moves for leave to file a brief annexed hereto as *amicus curiae* in this case. The written consent of petitioner has been obtained. The consent of respondent was requested but refused.

The AAA, founded in 1926, is an educational membership organization incorporated under the Not-For-Profit Corporation Law of the State of New York. Its purposes, among others, are to promote the knowledge and effective use of international commercial arbitration throughout the United States and other countries of the world. It has had extensive experience, along with such long-established institutions as the International Chamber of Commerce

(ICC), in conducting arbitrations arising from international business agreements.

From the time the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in 1958, the Association was in the forefront of organizations recommending accession to it by the United States. At the request of the State Department, the AAA convened an *ad hoc* committee of international arbitration experts to draft the proposed language for Chapter 2 of the United States Arbitration Act. This implementing legislation was required before the treaty could be ratified.

The Association believes that this is the first case in which this Court has been asked to determine the arbitrability of an international commercial agreement since the Convention and the Act became law in the United States. The interest of the international business community in the issues here involved far transcends the interests of the immediate litigants. If the Court were to uphold the decision of the United States Court of Appeals for the Seventh Circuit, it would impair the ability of American businessmen to freely negotiate and bargain for arbitral resolution of international commercial disputes and would force them to have recourse to the formalities and complexities of foreign court proceedings.

The AAA is not concerned with the outcome of this case as it affects the parties but with the prompt and effective enforcement of international agreements to arbitrate. It believes that it is in a position to be of assistance in calling to the Court's attention the broader implications of Convention and Act than have been or will be presented elsewhere.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, the AAA respectfully requests that this motion be granted.

Dated: March 6, 1974

Respectfully submitted,

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In the

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October Term, 1973

No. 73-781

Fritz Scherk,

Petitioner,

—v.—

Alberto-Culver Company,

Respondent.

BRIEF OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus*

This brief *amicus curiae* is filed on behalf of the American Arbitration Association, an educational membership organization, founded in 1926 and incorporated under the Not-for-Profit Corporation Law of the State of New York. The AAA has accumulated much knowledge and experience in the administration of international commercial arbitration. Among the Association's purposes are the fostering and promotion of the effective use of international arbitration. In furtherance of this purpose, the AAA was in the forefront of organizations recommending accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(U.N. Doc. No. E/Conf. 26/9 Rev. 1, 6/10 [1958]).[1] This Convention, *inter alia*, provided for prompt and effective enforcement of voluntary international agreements to arbitrate.

Amicus has no direct interest in the administration of the international arbitration between the parties. Under the agreement at issue, the controversy is to be administered not by the AAA but rather by a leading international organization, the International Chamber of Commerce (ICC). Nor has the AAA any interest in the *merits* of the dispute. The only concern of the Association is in having our judicial system grant the fullest recognition to the enforcement of international agreements to arbitrate.

This case presents the first opportunity for the Court to consider the Convention on the Recognition and Enforcement of Foreign Awards. As a necessary incident to enforcement of such awards, this Treaty provides for specific enforcement of voluntary international arbitration agreements. The decision in this case is likely to have a substantial impact upon the ability of businessmen to opt for arbitration as the exclusive method of settling their disputes and to avoid the complex and uncertain proceedings of foreign courts. For these reasons, the American Arbitration Association is filing this brief.

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[1] The U.N. was not a "controlling factor in this Convention; the title is purely formal. The "convention itself and the legal aspects of it" were a "matter of negotiation among the member States" (116 Cong. Rec., 91st Cong., July 6, 1970, p. H6335). The text of the Convention is appended to the Petitioner's Brief.

Summary of Argument

The international treaty here involved, ratified by the United States in 1970, reflects the official policy of this country to encourage the settlement of international disputes by arbitration. When, to implement it, Congress added a whole new chapter to the U.S. Arbitration Act, it intended the federal courts to give the fullest recognition possible to arbitral forums bargained for by the parties to international commercial agreements.

International arbitration is a desirable method for dispute settlement between parties of different countries and legal systems and is often greatly superior to available alternatives of local court proceedings. Unless an arbitration clause is invalid on its face, only the most pressing of public policy considerations should lead a United States court to prohibit its enforcement. The securities aspect of the agreement herein, entered between parties of equal bargaining power, does not afford a basis for prohibiting arbitration of a dispute arising thereunder.

ARGUMENT

Introduction

The Importance of International Commercial Arbitration

The Honorable Circuit Court Judge Stevens, in the dissent below, states that, "Since 1953 the policy of encouraging the settlement of disputes by arbitration has received increasingly strong endorsement" (484 F.2d 611, 616). In the international field, to meet the expanding overseas activities of American business enterprises, and with broad support from leaders of the bar, of industry, labor and business (116 Cong. Rec., 91st Cong., July 6, 1970, p. H6335), President Johnson, in 1968, urged upon Congress the enactment of Chapter 2 of the U.S. Arbitration Act (9 U.S.C. §§201 et seq.), the implementing legislation required before the United States could ratify the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards—which had first been promulgated in 1958. By 1970, this country had become a party to it.

That the enforcement of international arbitration is raised to the level of government policy is supported by the U.S.-U.S.S.R. Trade Agreement of 1972 which provides that:

> "Both governments encourage the adoption of arbitration for the settlement of disputes arising out of international commercial transactions concluded between natural and legal persons of the United States of America and foreign trade organizations of the Union of Soviet Socialist Republics" (67 Dep't State Bull. 595,597 [1972]).

Similar expressions of policy are included in the U.S.-Polish Agreements of 1972. (See U.S. Dep't of Commerce News Fact Sheet, Joint American-Polish Trade Commission, Second Sess., November 4-5, 1972.)

The American Bar Association, which had recommended that the United States become a party to the Convention as far back as 1960, has, since its ratification, continued to promote international commercial arbitration. As recently as February of this year, its House of Delegates adopted a Resolution pursuant to which the Association "calls upon all appropriate organizations of lawyers" of nonparticipating countries to encourage their respective Governments to make their countries parties to the Convention (Amer. Bar Ass'n, Section and Committee Reports to the House of Delegates, 1974 Midyear Meeting, Houston, Texas, pp. 101 b. et seq.).[2]

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[2] The complete Resolution reads as follows:

BE IT RESOLVED, that the American Bar Association calls upon all appropriate organizations of lawyers of the countries of the world which have not acceded to or ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbital Awards to convey to their respective Governments their expression of support for this Convention and to encourage their respective Governments to take whatever actions are necessary and appropriate to secure the accession or ratification of this Convention by their respective countries; and

BE IT FURTHER RESOLVED, that the President of the American Bar Association cause a copy of this Resolution to be forwarded to the appropriate organizations of lawyers of the relevant countries of the world.

POINT I

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as Implemented by Chapter 2 of the United States Arbitration Act (9 U.S.C. §§201 *et seq.*),[3] Requires a Federal District Court to Honor the Present International Arbitration Agreement.

A. *The Convention Demonstrates Beyond Peradventure That the Contracting Countries Intended to Permit the Nonenforcement of an International Arbitration Agreement Upon Only the Narrowest Grounds.*

Article II provides that arbitration will be prohibited only if the agreement is:

1. "null and void"
2. "inoperative"
3. "incapable of being performed" [par. 3]

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[3] This chapter has as its sole function the responsibility of implementing the Convention. The two are obviously interdependent. Thus, section 201 recites that the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." The Act not only reaffirms that this Treaty is the law of the land but also vests in the Federal courts—as opposed to state courts—jurisdiction over proceedings in connection with foreign arbitration agreements and awards.

Despite their interdependence, the Act goes beyond the Convention in many ways, a circumstance which demonstrates with what favor arbitration is looked upon by Congress. For instance, the Act authorizes the courts not only to "direct" arbitration in whatever place the agreement provides and regardless of "whether that place is within or without the United States" (§206) but also to "confirm" the award (§207)—procedures not specifically provided for in the Convention.

or it concerns

4. a "subject matter [not] capable of settlement by arbitration" [par. 1].

The Convention makes no attempt to define the types of agreements that the contracting countries are required to recognize and enforce. The coverage of arbitration agreements, in light of the breadth of the Convention itself, is necessarily very broad; clearly, only "nugatory" contracts are excluded. (Quigley, *Convention on Foreign Arbitral Awards,* 58 ABA J. 821, 822 [1972]).

The contracting countries did, however, allow themselves some leeway in the requirement above that the agreement concern "a subject matter [not] capable of arbitration" (Art. II, par. 1). This clause was inserted "in order to take proper account of the laws in force in many countries which prohibit the submission of certain questions to arbitration" (S. Exec. E, 90th Cong., 2nd Sess. [1968] p. 19). Were there a statute, for instance, which in so many words prohibited the submission to arbitration of a particular question or subject, the Convention would manifestly not be applicable. There is in the present case no such statute. Even the 1934 Securities Exchange Act which is peripherally involved (15 U.S.C. §78cc[a])—since the business being sold was to be converted into a stock corporation—contains no such explicit prohibition.[4]

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[4] In *Wilko* v. *Swan* (346 U.S. 427, 74 S. Ct. 182, 98 L.E. 168 [1953]), upon which the respondent relies, although the Court interpreted the 1933 Securities Act (15 U.S.C. §77n) there involved—which is similar to the present—as prohibiting arbitration, the rationale of its decision was based, not so much upon hostility to arbitration in security matters, as upon protection of an investor in light of the overweening bargaining power of his broker opponent.

Nor may it be said that an international arbitration agreement would offend the public policy of the United States simply because the parties agreed to arbitrate a transaction involving securities. Indeed, in the *Wilko* case, discussed above (p. 11, fn. 4), Mr. Justice Jackson was of the view that, after a "controversy arose," the "parties could agree upon arbitration in securities matters" (concurring opinion, 346 U.S. at p. 438; 74 S. Ct. at p. 189; see also, *Moran* v. *Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624 [1966]). It is significant, in this connection, that, some 17 years after *Wilko*, when it enacted Chapter 2 of the U.S. Arbitration Act to implement the Convention, Congress did not exclude from arbitration all international agreements dealing with securities. If that had been its intent, it could certainly have said so.

B. *The Present Arbitration Provision in Each of the Agreements Here Involved Comes Within the Ambit of the Convention and the Implementing Legislation Contained in Chapter 2 of the Arbitration Act.*

Quite different is the present situation from *Wilko* where a small investor, possessing little of the information available to a large brokerage concern, was bound to an arbitration agreement contained in the fine print of a 17-paragraph margin agreement. In the present case the arbitration agreement falls foursquare within the terms of the Convention and the Act. Here, "experienced and sophisticated businessmen," one American and one a German national, engaged in an "arm's-length negotiation." (Cf. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92

S. Ct. 1907, 32 L. ed.2d 513 [1972].) It is foreseeable in a transaction of this kind that disputes may arise about the assets included in the sale and, typically, an arbitration clause is bargained for and written into the contract of sale. If the parties disagree, among other things, about the promptness of delivery or payment or about the content of any warranties, they may provide for an agreed forum and means to settle their differences.

That is precisely what happened here. The parties came up with an artfully drawn arbitration agreement—not simply a form—which named a neutral country as the place for arbitration, before a well-established tribunal—the ICC—and specified the substantive law to be applied, that of the State of Illinois—which under the supremacy clause, of course, becomes the federal law.[5]

Although their contract of sale is alleged by the respondent to have been fraudulently induced, there is no claim of fraud in the making of the agreement to arbitrate itself. (Cf., e.g., *Prima Paint* v. *Flood & Conklin,* 388 U.S. 395,

[5] The arbitration clause reads in this way:

"The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance."

87 S. Ct. 1801, 18 L. ed.2d 1270 [1967].) Nor is there any contention that the contract between them is otherwise "null and void" or "inoperative." Accordingly, unless the securities aspect of the agreement be controlling—and we have sought to show that it is not—there is no question but that the contract falls clearly within the terms of both (1) the Convention which requires that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration" existing or future controversies arising thereunder (Art. II, par. 1) and (2) the Act, which undertakes to enforce arbitration agreements "falling under the Convention" (9 U.S.C. §202).[*]

C. *Arbitration Is Especially Important in International Transactions Because the Alternatives Are Often Unsatisfactory.*

This Court in *The Bremen* v. *Zapata Off-Shore Co.* (497 U.S. 1, *supra*) recognized that, in the light of present day commercial realities and expanding international trade, parties to international commercial transactions should be free to select their own methods of settlement of disputes. The use of arbitration is not only a convenient device to

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[*] In the interests of completeness, it should be noted that the agreement here in litigation was entered into in 1968, two years before the Convention became effective for the United States, although the request for arbitration was initiated subsequent thereto. However, in our view, there is no reason not to apply the Convention retroactively; in fact, the delegates to the Convention dealt specifically with this very question. (See Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Summary Analysis of Record of U.N. Conference, May/June 1958, p. 85; Quigley, *Convention on Foreign Arbitral Awards*, 58 ABA J. 821, 822 [1972]; cf., also, *The Island Terr. of Curacao* v. *Solitron Devices, Inc.*, —— F.2d ——, decided December 12, 1973 [2d Cir., Doc. No. 73-1664].) Thus, a proposal to include the language, "This Convention shall apply only to arbitral awards rendered after the entry into force of the Convention" (E/Conf. 26/SR. 21, p. 2), was voted down (Haight, p. 86) and the Convention contains no prospective language. It is only reasonable, therefore, to interpret it as applying retroactively to arbitration agreements previously executed.

meet this objective; arbitration is often greatly superior to adjudication by local courts—in terms of:

(1) neutrality of forum

(2) avoiding problems of personal jurisdiction

and above all,

(3) enforcement of the award.

(See, e.g., Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States,* 4 International Lawyer 720, 737-739 [1970]; Govindaraj, *Foreign Arbitral Awards and Foreign Judgments Based Upon Such Awards,* 13 Int. & Comp. L.Q. 1465 [1964].)

D. *The Courts of the Contracting Countries Should Be Reluctant to Find International Arbitration Agreements Unenforceable on Public Policy Grounds.*

The court of an enforcing country may, it is true, refuse enforcement of an arbitration agreement which it finds offends its foreign policy (Art. V, par. 2[b]; see Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of U.N. Conference,* May/June 1958, p. 28; S. Exec. E, 90th Cong., 2d Sess. [1968] p. 19)). In so doing, however, the exercise of the utmost "good faith" is necessary. As has often been said, the "public policy" provision "in effect relegates the efficacy of the convention to the good faith of contracting states." (Quigley, *Convention on Foreign Awards,* 58 A.B.A. J. 821, 825 [1972]; see also, Evans & Ellis, *International Commercial Arbitration,* 8 Tex. Int. L.J. 17, 55 [1973]; Quigley, *United Nations Convention,* 90 Yale L.J. 1049, 1070 [1961].) Undoubtedly, the "efficacy of the con-

vention" would be gravely impaired if the "public policy" prohibition were too freely resorted to by contracting countries. For instance, an enforcing state could hardly be said to be acting in "good faith" if it permitted a contracting party to delay arbitration by time-consuming court actions in which counsel urged nonarbitrability on specious grounds of fraud (cf., e.g., *Matter of Weinrott* [*Carp*], 32 N.Y.2d 190, 344 N.Y.S.2d 848 [1973]) or made other elaborate efforts to establish that a controversy which the parties had agreed to arbitrate was nonarbitrable through some forced construction of a statute of the forum country. As we have sought to show (*supra*, p. 12), the only possible public policy argument here advanced, the securities aspect of the agreement, does not justify the nonenforcement of the arbitration clause.

E. *The Convention's Purposes Would Be Thwarted If the Court Refused to Permit Arbitration in This Case.*

Before concluding, we would urge the Court to consider the effect of an affirmance in this case. If the United States is overready to defeat, on public policy grounds, an international arbitration agreement sought to be enforced by a foreign contracting party, it must expect its own nationals to be subject to the same treatment in the courts of foreign enforcing countries. (See, e.g., Sultan, *U.N. Arbitration Convention and U.S. Policy*, 53 Am. J. Int. L. 807, 825 [1959]; see also, discussion of *Golodetz* v. *Serajuddin* [reported in AIR 1963 SC 1044] in Report of Committee on Commercial Arbitration of Ministry of Commerce, Government of India, pp. 28-30 [1964].)

In other words, under well-settled principles of reciprocity, the nonrecognition of arbitration agreements by the United States becomes a double-edged sword. While

in the present case the American litigant appears to prefer to avoid arbitration and the European prefers to use it, in the next case it may be the American who seeks to enforce an arbitration clause or to stay a foreign court proceeding. Moreover, when an American businessman is competing with, say, a Swedish businessman for a contract with a German businessman, the American may well feel himself at a substantial disadvantage if he has to admit that an arbitration clause he might sign would be void in his own country.

Beyond that, an affirmance would open the door to delaying tactics through challenges to all kinds of international arbitration agreements, not only where securities are involved, but also in other areas where the arbitrability of contracts has been questioned, with varying success, in both state and lower federal courts. (See, e.g., *Kavit* v. *A. L. Stamm & Co.*, —— F.2d ——, [decided Jan. 22, 1974] N.Y.L.J., Vol. 171, No. 35, p. 1, col. 7; *Matter of Fotochrome, Inc.*, —— F. Supp. —— [E.D.N.Y. 1973], decided Sept. 20, 1973 [255 Bankruptcy Law Rep.]; *Lawson Fabrics, Inc.* v. *Akzona, Inc.*, 355 F. Supp. 1146 [1973]; *Alco Standard Corp.* v. *Benalal*, 345 F. Supp. 14 [1972]; *Landegger* v. *Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692 [1972]; *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968 [1968].)

CONCLUSION

The purpose of international arbitration is to provide a speedy, economical and final determination of disputes arising out of international arbitration. In the present case, a copy of the respondent's request for arbitration was served upon the petitioner on November 15, 1971 (Appendix, p. 70). It is now more than two years later, and the controversy has not yet been heard by arbitrators. This is precisely the type of delay that the Convention and Act were designed to avoid.

It should be remarked, moreover, that the Convention makes international arbitral awards more secure than judgments of local courts, because all the parties to the Treaty have undertaken to enforce such awards, while very few have undertaken to enforce foreign judgments. Any undermining of the Convention by a disregard of arbitration agreements freely entered into would be a substantial setback for dispute settlement on the international scene.

Rather than fostering arbitration as the long-approved method of settling commercial controversies, the court is, it would seem, being asked by the respondent to initiate a return to the "old judicial hostility to arbitration" which the courts were urged to "shake off" more than 30 years

ago. (*Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 [2d Cir. 1942, per Frank, J.].)

Date: Mar. 6, 1974

Respectfully submitted,

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